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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 VERONICA J. AGOSTINO,)
7 Plaintiff,) No. CV-09-108-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12 _____)

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on May 17, 2010 (Ct. Recs.
15 22,24). Attorney Maureen J. Rosette represents plaintiff; Special
16 Assistant United States Attorney David I. Blower represents the
17 Commissioner of Social Security ("Commissioner"). The parties have
18 consented to proceed before a magistrate judge (Ct. Rec. 7). On
19 April 12, 2010, plaintiff filed a reply (Tr. 26). After reviewing
20 the administrative record and the briefs filed by the parties, the
21 court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 24)
22 and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 22).

23 **JURISDICTION**

24 Plaintiff applied for supplemental security income (SSI) and
25 disability insurance benefits (DIB) March 6, 2006, alleging
26 disability since July 15, 2005 due to anxiety, depression, lichens
27 planus, right shoulder torn rotator cuff and fractures, arthritis
28

1 and tendinitis (Tr. 57-59,60-61,664-667). Her applications were
2 denied initially and on reconsideration (Tr. 49-50,669-672,674-
3 675).

4 Administrative Law Judge (ALJ) Wayne Araki held a hearing on
5 February 25, 2008. Plaintiff, represented by counsel, and
6 vocational expert Daniel R. McKinney testified (Tr. 682-723). The
7 ALJ found plaintiff was insured for DIB purposes through December
8 31, 2010 (Tr. 17,18). In his September 3, 2008, decision, he found
9 although plaintiff could not perform past work, there are other
10 jobs she can perform. The ALJ's step five finding meant plaintiff
11 is not disabled as defined by the Act (Tr. 28). On March 26, 2010,
12 the Appeals Council denied review (Tr. 5-7). Therefore, the ALJ's
13 decision became the final decision of the Commissioner, which is
14 appealable to the district court pursuant to 42 U.S.C. § 405(g).
15 Plaintiff filed this action for judicial review pursuant to 42
16 U.S.C. § 405(g) on April 10, 2009 (Ct. Recs. 2,4).

17 **STATEMENT OF FACTS**

18 The facts have been presented in the administrative hearing
19 transcripts, the ALJ's decision, the briefs of both parties, and
20 are summarized here.

21 Ms. Agostino was 45 years old on the alleged date of onset
22 (Tr. 27). She graduated from high school and completed three years
23 of college, including earning an AAS degree in civil engineering
24 in 1997 (Tr. 68). Ms. Agostino lives alone (Tr. 82,685,690). Daily
25 activities include reading, watching television, caring for pets,
26 and preparing easy meals (Tr. 82-84,86,701). About nine months
27 after onset, plaintiff reported that when she felt well, she
28 walked two miles daily, read the Bible with her neighbor, shopped

1 for groceries twice a month, and attended church weekly (Tr.
2 82,85-86).

3 Ms. Agostino worked for the Social Security Administration
4 (SSA) for five years. When she was terminated in July of 2005, she
5 worked as a senior case technician (Tr. 61,490,685-686). She
6 testified she cannot work because Grave's disease causes hot
7 flashes, chest pain, shaking, numbness, confusion, and fatigue
8 (Tr. 692,698,703). Plaintiff has anxiety and depression (Tr. 708).
9 She suffers about two migraine headaches a month. Lichen planus
10 causes mouth and genital sores. She suffers pain in her right
11 shoulder, stomach, chest, back, and legs. Plaintiff experiences
12 sleep problems and vertigo (Tr. 702,704-705,707-708). Due to
13 shoulder and heart or chest pain, she is able to walk less than a
14 block and sit no more than 30 minutes. Plaintiff testified she can
15 carry less than five pounds. She stays in bed four days a week
16 (Tr. 692-698,700-701,704-705).

17 SEQUENTIAL EVALUATION PROCESS

18 The Social Security Act (the "Act") defines "disability"
19 as the "inability to engage in any substantial gainful activity by
20 reason of any medically determinable physical or mental impairment
21 which can be expected to result in death or which has lasted or
22 can be expected to last for a continuous period of not less than
23 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
24 also provides that a Plaintiff shall be determined to be under a
25 disability only if any impairments are of such severity that a
26 plaintiff is not only unable to do previous work but cannot,
27 considering plaintiff's age, education and work experiences,
28 engage in any other substantial gainful work which exists in the

1 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
2 the definition of disability consists of both medical and
3 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
4 (9th Cir. 2001).

5 The Commissioner has established a five-step sequential
6 evaluation process for determining whether a person is disabled.
7 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
8 is engaged in substantial gainful activities. If so, benefits are
9 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
10 the decision maker proceeds to step two, which determines whether
11 plaintiff has a medically severe impairment or combination of
12 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

13 If plaintiff does not have a severe impairment or combination
14 of impairments, the disability claim is denied. If the impairment
15 is severe, the evaluation proceeds to the third step, which
16 compares plaintiff's impairment with a number of listed
17 impairments acknowledged by the Commissioner to be so severe as to
18 preclude substantial gainful activity. 20 C.F.R. §§
19 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
20 App. 1. If the impairment meets or equals one of the listed
21 impairments, plaintiff is conclusively presumed to be disabled. If
22 the impairment is not one conclusively presumed to be disabling,
23 the evaluation proceeds to the fourth step, which determines
24 whether the impairment prevents plaintiff from performing work
25 which was performed in the past. If a plaintiff is able to perform
26 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§
27 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's
28 residual functional capacity ("RFC") assessment is considered. If

1 plaintiff cannot perform this work, the fifth and final step in
2 the process determines whether plaintiff is able to perform other
3 work in the national economy in view of plaintiff's residual
4 functional capacity, age, education and past work experience. 20
5 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
6 482 U.S. 137 (1987).

7 The initial burden of proof rests upon plaintiff to establish
8 a *prima facie* case of entitlement to disability benefits.
9 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
10 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
11 met once plaintiff establishes that a physical or mental
12 impairment prevents the performance of previous work. The burden
13 then shifts, at step five, to the Commissioner to show that (1)
14 plaintiff can perform other substantial gainful activity and (2) a
15 "significant number of jobs exist in the national economy" which
16 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
17 Cir. 1984).

18 STANDARD OF REVIEW

19 Congress has provided a limited scope of judicial review of a
20 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
21 the Commissioner's decision, made through an ALJ, when the
22 determination is not based on legal error and is supported by
23 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
24 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
25 "The [Commissioner's] determination that a plaintiff is not
26 disabled will be upheld if the findings of fact are supported by
27 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
28 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is

1 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
2 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
3 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
4 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
5 573, 576 (9th Cir. 1988). Substantial evidence "means such
6 evidence as a reasonable mind might accept as adequate to support
7 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
8 (citations omitted). "[S]uch inferences and conclusions as the
9 [Commissioner] may reasonably draw from the evidence" will also be
10 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
11 review, the Court considers the record as a whole, not just the
12 evidence supporting the decision of the Commissioner. *Weetman v.*
13 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
14 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

15 It is the role of the trier of fact, not this Court, to
16 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
17 evidence supports more than one rational interpretation, the Court
18 may not substitute its judgment for that of the Commissioner.
19 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
20 (9th Cir. 1984). Nevertheless, a decision supported by substantial
21 evidence will still be set aside if the proper legal standards
22 were not applied in weighing the evidence and making the decision.
23 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
24 433 (9th Cir. 1987). Thus, if there is substantial evidence to
25 support the administrative findings, or if there is conflicting
26 evidence that will support a finding of either disability or
27 nondisability, the finding of the Commissioner is conclusive.
28 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

ALJ'S FINDINGS

At step one, the ALJ found plaintiff did not engage in substantial gainful activity after onset on July 15, 2005 (Tr. 18). At steps two and three, ALJ Araki found plaintiff suffers from status post fracture of proximal humerus on the right, status post right rotator cuff tear, Graves' disease, depression and a personality disorder, impairments that are severe but which do not alone or combination meet or medically equal a Listed impairment (Tr. 18, 22). The ALJ found plaintiff less than completely credible (Tr. 24). At step four, he found plaintiff cannot perform her past work (Tr. 26). At step five, relying on a vocational expert, the ALJ found plaintiff could perform other jobs such as general office clerk, election clerk, package inspector, and small parts assembler (Tr. 28). Because the ALJ found Ms. Agostino could perform other work, she is not disabled as defined by the Social Security Act (Tr. 28). While there is evidence of substance abuse in the record, the ALJ's determination plaintiff is not disabled meant he was not required to determine if DAA materially contributes to the disability determination. See *Ball v. Massanari*, 254 F.3d 817 (9th Cir. 2001).

ISSUES

Plaintiff alleges the ALJ erred when he weighed the evidence of physical and mental impairment. She contends this in turn led the ALJ to assess an incomplete RFC (Ct. Rec. 23 at 17-24). The Commissioner answers the Court should affirm the decision because it is supported by the evidence and free of error (Ct. Rec. 25 at 18).

DISCUSSION

1 **A. Standards for weighing medical evidence**

2 In social security proceedings, the claimant must prove the
3 existence of a physical or mental impairment by providing medical
4 evidence consisting of signs, symptoms, and laboratory findings;
5 the claimant's own statement of symptoms alone will not suffice.
6 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
7 on the basis of a medically determinable impairment which can be
8 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
9 medical evidence of an underlying impairment has been shown,
10 medical findings are not required to support the alleged severity
11 of symptoms. *Bunnell v. Sullivan*, 947, F. 2d 341, 345 (9th Cr.
12 1991).

13 A treating physician's opinion is given special weight
14 because of familiarity with the claimant and the claimant's
15 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
16 1989). However, the treating physician's opinion is not
17 "necessarily conclusive as to either a physical condition or the
18 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
19 751 (9th Cir. 1989)(citations omitted). More weight is given to a
20 treating physician than an examining physician. *Lester v. Cater*,
21 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
22 given to the opinions of treating and examining physicians than to
23 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
24 (9th Cir. 2004). If the treating or examining physician's opinions
25 are not contradicted, they can be rejected only with clear and
26 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
27 ALJ may reject an opinion if he states specific, legitimate
28 reasons that are supported by substantial evidence. See *Flaten v.*

1 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
2 1995).

3 In addition to the testimony of a nonexamining medical
4 advisor, the ALJ must have other evidence to support a decision to
5 reject the opinion of a treating physician, such as laboratory
6 test results, contrary reports from examining physicians, and
7 testimony from the claimant that was inconsistent with the
8 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
9 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
10 Cir. 1995).

11 **B. Treating and examining opinions**

12 Plaintiff alleges the ALJ erred when he weighed the
13 conflicting opinions of treating, examining, and reviewing
14 professionals: primary care treating physician Anne Montgomery,
15 M.D.; treating orthopedic surgeon Craig Barrow, M.D.; examining
16 psychologist James Bailey, Ph.D. (4/18/2006); treating therapist
17 Dennis Anderson, MS (1/2004 through 6/2006), and reviewing
18 physician Eugene Kester, M.D. (6/2006)(Ct. Rec. 23 at 18-24).

19 The ALJ considered Dr. Montgomery's four contradicted
20 opinions (Tr. 19-22,24-26, referring to Exhibits 11F,21F,23F and
21 26F at Tr. 231-234 (April 2006); Tr. 478-481 (November 2006); Tr.
22 469-472 (March 2007), and Tr. 478-481 (November 2007). Dr.
23 Montgomery began seeing plaintiff on October 31, 2005 (Tr. 384),
24 about three months after onset. On November 30, 2005, she opined
25 plaintiff was unable to perform her usual work as a typist
26 (although Ms. Agostino just found a new job as a typist and
27 receptionist) because plaintiff fractured her right arm when she
28 fell earlier in November (Tr. 380-381). ER records show prior to

1 her fall, plaintiff's family said she was taking 4 or 5 ultram
2 pills at a time. The ALJ notes it "was felt that these were
3 triggering her seizures" that caused her to fall and break her arm
4 (Tr. 24; Tr. 285,381-382). In April of 2006, Dr. Montgomery opined
5 plaintiff's ability to work was severely limited. Ms. Agostino was
6 unable to lift, handle, or carry. Her arm fracture was very slow
7 healing. Future surgery was planned and plaintiff was undergoing
8 physical therapy. Dr. Montgomery indicated is an indication of
9 current or historical alcohol or drug abuse (Tr. 232-233).

10 Seven months later, in November of 2006, Dr. Montgomery again
11 opined right shoulder surgery was planned when medical problems
12 stabilized, including mouth sores caused by lichen planus and
13 stabilizing symptoms of Grave's disease. Plaintiff's use of her
14 right arm was limited due to restricted ROM and pain. Dr.
15 Montgomery limited plaintiff to sedentary work, as before. She
16 could not lift with her right arm, and suffered poor stamina (Tr.
17 478-481)

18 ALJ considered Dr. Barrow's contradicted opinion in March of
19 2006 that plaintiff could not lift, handle, or carry and had no
20 use of her right arm. Dr. Barrow diagnosed a torn right rotator
21 cuff, right arm proximal humerus fracture, impingement, and AC
22 joint degenerative disc disease (DDD)(Tr. 19, referring to Tr.
23 229. Dr. Barrow recommended physical therapy and opined without
24 medical treatment the impairments would last a maximum of 12
25 months (Tr. 228-230). Later, in response to a question by Ms.
26 Agostino, Dr. Barrow opined he was unaware of rotator cuff tears
27 caused by typing (Tr. 402).

28 The ALJ considered the contradicted opinion of examining

1 psychologist Dr. Bailey (Tr. 20,22,24,26 referring to Tr. 235-
2 243). On April 18, 2006 ¹ [about nine months after onset], Dr.
3 Bailey notes plaintiff complained of depression, agitation and
4 sleep problems. She has seen therapist Dennis Anderson since 2004
5 "weekly and works on assertiveness." Plaintiff attends physical
6 therapy 1-2 times a week (Tr. 235). At her last job with the SSA
7 she performed basic secretarial work "such as filing and visiting
8 with others." The job ended "because she took lorazepam and became
9 confused" but her boss did not believe her. The case was in
10 arbitration. Plaintiff admitted two past treatment attempts for
11 oxycontin addiction (Tr. 236). Her daughter pays the bills because
12 plaintiff is unable to get out bed (Tr. 236). She has a license
13 and drives, needs help with cleaning and shopping, walks up to 2
14 miles a day, attends church occasionally and watches 1-2 movies a
15 day (Tr. 237). Interestingly, Dr. Bailey observes plaintiff
16 appears to be right handed. "She has a notebook and made a few
17 notes" (Tr. 237).

18 Dr. Bailey diagnosed rule out prescription drug abuse and
19 personality disorder NOS with passive-aggressive and depressive
20 features. He assessed a current GAF of 60, while the highest in
21 the past year was 75. He notes plaintiff's MMPI-2 results are of
22 "doubtful validity" (Tr. 238). Dr. Bailey assessed marked
23 limitations in depressed mood and physical complaints, a number of
24 moderate limitations, and estimated the impairment would last a
25 maximum of six months (Tr. 241-243).

27 ¹The report is dated April 14, 2006 (Tr. 235) and April 18,
28 2006 (Tr. 243). The Court uses the latter for clarity.

1 The ALJ considered treating therapist Mr. Anderson's June 1,
2 2006 opinion (Tr. 20, referring to Tr. 356-357). He opined
3 plaintiff's overuse of pain medication exacerbates depression (Tr.
4 356). He notes it "has been challenging to maintain a consistent
5 thread of treatment with her," having seen plaintiff
6 "intermittently" since October of 2004. Mr. Anderson opined her
7 symptoms are difficult to manage on an infrequent basis. He felt
8 she would benefit from ongoing group and individual psychotherapy
9 to help stabilize her life (Tr. 357).

10 The ALJ considered the contradicted June of 2006 opinion of
11 Dr. Kester, an agency reviewing doctor (Tr. 20, referring to Tr.
12 144-146 at Tr. 142). In June of 2006 Dr. Kester notes plaintiff
13 took narcotic pain medication at work for her right shoulder
14 injury and "became confused at work." She was gone for three
15 hours. Plaintiff said she was with her therapist, but this was
16 untrue (Tr. 142). Two months after onset, in September of 2005,
17 Dr. Kester notes records indicate normal mental status after a
18 Caribbean cruise vacation. Test results on the MMPI-2 are of
19 "doubtful" validity. He assessed several moderate limitations and
20 limited plaintiff to superficial public contact (Tr. 144-146).

21 The ALJ considered Dr. Montgomery's contradicted 2007
22 opinions (Tr. 24-26; Tr. 469-472, 478-481).

23 In March of 2007, Dr. Montgomery notes shoulder surgery and
24 tooth extractions are planned and therapy for Grave's disease is
25 not yet stable (Tr. 470, 472). She assessed essentially the same
26 RFC as previously (Tr. 470-471). In November of 2007, plaintiff
27 had not had surgery, and Dr. Montgomery repeated her March opinion
28 (Tr. 479-481).

1 To aid in weighing the conflicting medical evidence, the ALJ
2 assessed plaintiff's credibility (Tr. 24-26), an unchallenged
3 finding. Credibility determinations bear on evaluations of medical
4 evidence when an ALJ is presented with conflicting medical
5 opinions or inconsistency between a claimant's subjective
6 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.3d
7 683,688 (9th Cir. 2005).

8 It is the province of the ALJ to make credibility
9 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
10 1995). However, the ALJ's findings must be supported by specific
11 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
12 1990). Once the claimant produces medical evidence of an
13 underlying medical impairment, the ALJ may not discredit testimony
14 as to the severity of an impairment because it is unsupported by
15 medical evidence. *Reddick v. Chater*, 157 F.3d 715,722 (9th Cir.
16 1998). Absent affirmative evidence of malingering, the ALJ's
17 reasons for rejecting the claimant's testimony must be "clear and
18 convincing." *Lester v. Chater*, 81 F.3d 821,834 (9th Cir. 1995).
19 "General findings are insufficient: rather the ALJ must identify
20 what testimony not credible and what evidence undermines the
21 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
22 *Shalala*, 12 F.3d 915,918 (9th Cir. 1993).

23 The ALJ gave clear and convincing reasons for his
24 unchallenged credibility assessment, including in part (1) drug
25 seeking behavior and failing to take medication as prescribed; (2)
26 complaints unsupported by the evidence; (3) testimony inconsistent
27 with treatment records; and (4) activities inconsistent with
28 claimed limitations (Tr. 24-25).

1 In December of 2007, Dr. Montgomery declined plaintiff's
2 request for stronger medication because she had a history of
3 inappropriate use, as the ALJ observes (Tr. 25, referring to
4 Exhibit 30F/108-109 at Tr. 597, repeated at Tr. 654). Failing to
5 follow medical treatment impairs credibility. See *Fair v. Bowen*,
6 885 F.2d 597,603 (9th Cir. 1989); *Thomas v. Barnhart*, 278 F.3d
7 947,958-959 (9th Cir. 2002). Drug seeking behavior is another well
8 recognized reason to discount credibility. See *Edlund v.*
9 *Massanari*, 253 F.3d 1152,1157-1158 (9th Cir. 2001).

10 Medical findings undercut plaintiff's credibility (Tr. 24).
11 The ALJ relied on the results of examining doctor Christopher
12 Goodwin, M.D., in May of 2006, about ten months after onset:

13 On examination she had "immediate psychogenic
14 overlay" such as groaning with light touch of
15 the scapula and cogwheel type resistance [with]
16 even the slightest range of motion of the upper
17 extremity (Exhibit 18F at 5-6). The claimant's
18 non-organic findings undercut her credibility.

19 (Tr. 24, referring to Tr. 362-363). Dr. Goodwin would only treat
20 plaintiff in a "narcotic free program" (Tr. 363).

21 A lack of supporting objective medical evidence is a factor
22 which may be considered in evaluating an individual's credibility,
23 provided it is not the sole factor. *Bunnell v. Sullivan*, 347 F.2d
24 341,345 (9th Cir. 1991).

25 Plaintiff testified the prescribed migraine medication she
26 takes regularly does not prevent migraine headaches (Tr. 696). The
27 ALJ points out Dr. Montgomery's treatment notes indicate plaintiff
28 does well on the same medication (Tr. 25, referring to Tr. 576-
577).

The ALJ considered plaintiff's activities. She took a
Caribbean cruise two months after onset (September of 2005 at Tr.

1 290); walked up to two miles and watched 1-2 movies daily;
2 attended church occasionally (April 2006 at Tr. 237); pruned roses
3 and pulled weeds (May of 2006 at Tr. 362); went dancing (May of
4 2006 at Tr. 461); and camped (August of 2006 at Tr. 467).

5 Each reason is clear, convincing and supported by substantial
6 evidence. *See Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir.
7 2002)(proper factors include inconsistencies in plaintiff's
8 statements, inconsistencies between statements and conduct, and
9 extent of daily activities). While an ALJ may not reject a
10 claimant's subjective complaints based solely on a lack of
11 objective medical evidence, it is a proper factor to consider. *See*
12 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991)(en banc).
13 Noncompliance with medical care or unexplained or inadequately
14 explained reasons for failing to seek medical treatment cast doubt
15 on a claimant's subjective complaints. 20 CFR §§ 404.1530, 426.930;
16 *Fair v. Bowen*, 885 F.2d at 603.

17 When assessing the contradictory evidence, the ALJ considered
18 the opinions of other treating professionals. On July 2, 2007,
19 treating neurologist John Wurst, M.D., assessed episodic migraine
20 and numerous subjective concerns "with no objective abnormalities
21 on neurologic exam." Dr. Wurst notes plaintiff had very good
22 results with maxalt-MLT [rizatriptan] for migraine in the past,
23 but it was not covered by her insurance (Tr. 21, referring to Tr.
24 473). Based on plaintiff's complaints of speech and cognitive
25 problems, Dr. Wurst planned to taper her current migraine
26 medication, topamax [topiramate] (tr. 473). More than three weeks
27 later, on July 27, 2007, Dr. Montgomery observes plaintiff had
28 been doing very well on, but stopped taking, topomax after seeing

1 Dr. Wurst. Dr. Montgomery told plaintiff to start titrating
2 topamax back up to the previous dose (Tr. 21; Tr. 574-576). On
3 August 2, 2007, Dr. Wurst encouraged plaintiff to follow Dr.
4 Montgomery's plan, specifically, to titrate back up her dose of
5 topamax (Tr. 475). While it requires a close reading of the
6 record, the ALJ is correct plaintiff apparently chose to stop
7 taking topamax against the recommendation of her treating
8 neurologist (Tr. 21, Tr. 475), as well as her primary care
9 physician, a choice undermining plaintiff's claim of disabling
10 headaches. The ALJ notes a lot of plaintiff's drug seeking
11 behavior appears tied to migraine complaints in the ER, and none
12 of Dr. Montgomery's opinions list migraine as a severe impairment
13 (Tr. 22), additional reasons which support the ALJ's assessment of
14 the evidence.

15 The ALJ properly weighed the conflicting evidence. Dr.
16 Montgomery opined plaintiff's hyperthyroidism "very significantly
17 interfered with her ability to walk and handle"; poor nutrition
18 [caused by lichen planus and tooth extractions] significantly
19 interfered with walking, and plaintiff could not lift her right
20 arm (Tr. 425). The Commissioner correctly observes the ALJ's
21 reasons for rejecting these contradicted assessed limitations
22 include (1) contradictory findings by plaintiff's orthopedic
23 treatment specialists, and (2) limitations related to lichen
24 planus did not last the requisite twelve months (Ct. Rec. 25 at 8-
25 9, citing Tr. 26; 425,469-472,478-481). Both are specific,
26 legitimate and fully supported by the record.

27 Similarly, the ALJ's failure to accept or reject Dr. Barrow's
28 March of 2006 opinion plaintiff could not use her right arm (Tr.

1 229) is at most harmless error. Dr. Barrow opined the limitation
2 would last a maximum of three to twelve months (Tr. 230). The
3 Commissioner asserts any error by the ALJ in failing to address
4 Dr. Barrow's opinion is harmless error since the doctor did not
5 expect the limitation to last twelve months (Ct. Rec. 25 at 10).

6 An ALJ properly rejects the opinion of a treating or
7 examining doctor if it is contradicted by another doctor's opinion
8 by providing specific and legitimate reasons that are supported by
9 substantial evidence. *Bayliss v. Barnhart*, 427 F.3d 1211,1216 (9th
10 Cir. 2005). The ALJ did not specifically address Dr. Barrow's
11 March 2006 opinion plaintiff had no use of her right arm; however
12 that evidence was neither "significant nor probative" and there
13 was substantial evidence to the contrary. See *Howard ex rel. Wolff*
14 *v. Barhart*, 341 F.3d 1006,1012 (9th Cir. 2003). The error if any is
15 harmless because the ALJ pointed out plaintiff's extensive
16 activities; these are inconsistent with Dr. Barrow's assessed "no
17 use" of plaintiff's right arm. Plaintiff engaged in a wide variety
18 of activities near the date of Dr. Barrow's opinion, including
19 pruning roses and pulling weeds (*cf.* Tr. 229 with Tr. 362). An ALJ
20 may properly discount an assessed limitation contradicted by
21 plaintiff's activities. See *e.g.*, *Valentine v. Comm'r of Soc.*
22 *Sec.*, 574 F.3d 685,690 (9th Cir 2001).

23 The ALJ properly weighed the reports by Drs. Bailey and
24 Kester. With one exception, the ALJ adopted Dr. Kester's narrative
25 RFC (Tr. 23; 146). The Commissioner accurately points out the ALJ
26 rejected reviewing Dr. Kester's assessed social limitations by
27 relying on the narrative portion of examining psychologist Dr.
28 Bailey's report. The ALJ found plaintiff's social limitations were

1 "related to the specific work environment at her most recent job"
2 (Tr. 26), an unchallenged finding on appeal (Ct. Rec. 25 at 14,
3 n.4).

4 The ALJ assessed an RFC that included frequent contact with
5 the general public, co-workers and supervisors. Plaintiff could
6 understand, remember, and carry out simple and detailed, but not
7 complex, instructions or tasks (Tr. 715-716).

8 Relying on *Stubbs-Danielson v. Astrue*, 539 F.3d 1169 (9th Cir.
9 2008), the Commissioner asserts the ALJ's RFC translates
10 plaintiff's condition into the only concrete restrictions
11 available to him - in *Danielson*, this was the state agency
12 psychologist's limitation to "simple tasks." The Court found this
13 does not constitute a rejection of the examining physician's
14 opinion (Ct. Rec. 25 at 14-15, citing *Stubbs*, 539 F.3d at 1174
15 (additional citation omitted)).

16 The ALJ properly weighed the conflicting evidence. The
17 assessed RFC is supported by the record and free of legal error.
18 To the extent the ALJ rejected some of the contradicted opinions
19 of some of the treating, examining, and reviewing professionals,
20 his reasons are legitimate, specific, and supported by substantial
21 evidence in the record. See *Lester v. Chater*, 81 F.3d at 830-831
22 (holding that the ALJ must make findings setting forth specific,
23 legitimate reasons for rejecting the treating physician's
24 contradicted opinion).

25 The trier of fact, and not the reviewing court, must resolve
26 conflicts in the evidence and, if the evidence can support either
27 outcome, the court may not substitute its judgment for that of the
28 ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992); *Burch*

1 v. *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).

2 **CONCLUSION**

3 Having reviewed the record and the ALJ's conclusions, this
4 Court finds the ALJ's decision is free of legal error and
5 supported by substantial evidence..

6 **IT IS ORDERED:**

7 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 24**) is
8 **GRANTED.**

9 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 22**) is
10 **DENIED.**

11 The District Court Executive is directed to file this Order,
12 provide copies to counsel for Plaintiff and Defendant, enter
13 judgment in favor of Defendant, and **CLOSE** this file.

14 DATED this 14th day of July, 2010.

15
16 s/ James P. Hutton

17 JAMES P. HUTTON
18 UNITED STATES MAGISTRATE JUDGE
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